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SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General,

Petitioners,

v.

JATURUN SIRIPONGS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL E. LUNGREN,
Attorney General
GEORGE WILLIAMSON, Chief
Assistant Attorney General
GARY W. SCHONS, Senior
Assistant Attorney General
WILLIAM M. WOOD, Supervising
Deputy Attorney General
M. HOWARD WAYNE, Supervising
Deputy Attorney General
LAURA WHITCOMB HALGREN
Deputy Attorney General

110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2298

Attorneys for Petitioner

55pp

QUESTIONS PRESENTED

1. Despite the principles of Blackledge v. Allison, is a habeas petitioner in a death penalty case entitled to "develop the record" in an evidentiary hearing even though, following investigation and discovery and spending over $350,000 in court authorized funds, he was unable to counter the State's motion for summary judgment by demonstrating that a genuine issue of fact existed regarding either prong of Strickland?

2. Do the principles of Blackledge v. Allison apply to the prejudice prong of Strickland?

3. After a district court finds defense counsel's actions were based on reasonable tactics, may the court of appeals reverse that finding by engaging in the type of hindsight analysis prohibited by Strickland?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Arthur Calderon, Warden, California State Prison at San Quentin, California and Daniel E. Lungren, Attorney General of the State of California, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, issued on October 13, 1994, reversing the district court's grant of

summary judgment and remanding this death penalty case for an evidentiary hearing in the district court.

OPINIONS BELOW

The modified opinion of the court of appeals (App., A1-A81) is reported at ___ F.3d ____, 1994 U.S. App LEXIS 28305, 94 Daily Journal DAR 14461 (Oct. 13, 1994). The previous, unmodified opinion of the court of appeals (App., B82-B160) is reported at ___ F.3d ___, 94 C.D.O.S. 5105, 94 Daily Journal DAR 9410 (July 1, 1994). The opinion of the district court (App., C161-C246), is unreported.

JURISDICTION

The court of appeals filed its original opinion on July 1, 1994. App., B82. On October 13, 1994, the court of appeals entered judgment by filing an amended opinion and an order denying petitions for rehearing and rejecting

suggestions for rehearing en banc. App., A1-A4. The jurisdiction of this Court is invoked under 28 U.S.C. sections 1651 and 2254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading,

but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

STATEMENT OF THE CASE

A. Procedural Background

On April 22, 1983, Jaturun Siripongs was sentenced to death for the intentional murders of Packovan Wattanaporn and Quach Nguyen in the course of a burglary/robbery. His conviction and sentence were affirmed on direct appeal. People v. Siripongs, 45 Cal. 3d 548, 247 Cal. Rptr. 729, 754 P.2d 1306 (1988), cert. denied., 488 U.S. 1019, 109 S. Ct. 820, 102 L. Ed. 2d 810 (1989).

The jurisdiction of the district court was invoked under 28 U.S.C. section 2254. On November 9, 1989, a stay of execution was issued by the federal district court. Thereafter, Siripongs filed a petition for writ of habeas corpus. After authorizing investigation and discovery, the district court denied Siripongs' motion for evidentiary hearing, granted the state's motion for summary judgment and, accordingly, denied Siripongs' petition for writ of habeas corpus. App., C162.

In a published opinion filed on July 1, 1994, the Ninth Circuit vacated in part the district court's judgment, affirmed in part, and remanded for an evidentiary hearing on Siripongs' ineffective assistance of counsel claims. App., B82, B149. Both sides filed petitions for rehearing and suggestions for rehearing en banc. On October 13,

1994, the Ninth Circuit filed an order and amended opinion which did not affect the previous remand order, denied the petitions for rehearing and rejected the suggestions for rehearing en banc. App., A1-A4.

The Ninth Circuit has stayed issuance of the mandate to November 18, 1994, pending the filing of this petition. Fed. Rules App. Proc., rule 41(b); Ninth Circuit rule 41-1.

B. The Trial Evidence Against Siripongs[1/]

Thai market owner Packovan "Pat" Wattanaporn was strangled and her employee, Quach Nguyen, was stabbed to death in a burglary/robbery in December 1981. RT 1583-84, 1696-97, 1764-65, 2477-80, 2491-2505. The evidence linking

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1. A more detailed presentation of the trial evidence is set forth in the district court's opinion. App., C161-C175.

Siripongs to the murders was "powerful." App., A71. He had previously worked at the market. RT 1760, 1871. The night before the murders, he had arranged for his girlfriend's sister, "Noon," to call his boss the next day to say he was sick. RT 2365-69. A letter to Noon was found near Quach's body. Noon had last seen the letter in a jacket she kept at Siripongs' house. RT 2364, 2378-91.

A few hours after the murders, Siripongs arrived at the house of his girlfriend, "Peung," with his fingers bandaged and bleeding. The cuts were consistent with Siripongs' hand slipping down the blade of a knife when he stabbed Nguyen. RT 1811-12, 2501-02, 2699, 3363. He lied about the cause of his injuries and asked Peung's brother to wash the floor mats in his car. RT 2057-59, 2072-74, 2086, 2133, 2140-41, 2157-60, 2380, 2117-19. That evening, Siripongs arranged

to sell jewelry that had been taken from Pat Wattanaporn. RT 1782-87, 2585-86, 2611, 2613-18.

The next day, in a dumpster at a shopping center where Siripongs did his laundry, police found Noon's jacket which had contained her letter, bloodstained clothing, two knives, a wadded bandanna containing a bandage wrapper, bloody cord, papers from the market and Pat Wattanaporn's purse. RT 2076-77, 2239-57, 2284-2316, 2384-85, 2410-15, 2424-25, 2454-66, 2695-2701.

Siripongs began using the Wattanaporn's credit cards to make purchases at area department stores. RT 1789-95, 2724-26. He was arrested after attempting to purchase a television at Sears. RT 2528-2536, 2749-51.

Blood analysis revealed that some of the blood stains at the market and on clothes in the dumpster were consistent

with Siripongs' blood and inconsistent with the blood of the victims. RT 2978-90, 2994-95, 3064. Two hair samples found in the dumpster were consistent with Siripongs' hair. RT 2927.

From jail, Siripongs called his girlfriend and ordered her to go to his house to remove incriminating evidence. RT 2142-48, 2356-59, 3214-24. Police searched the house and found jewelry belonging to Pat Wattanaporn, sales receipts from purchases made with her credit cards, a set of knives similar to one of the knives found in the dumpster, and a new pair of shoes, which were the same size as a pair of blood soaked shoes found in the dumpster. RT 1705-09, 1777-81, 1789-92, 3069-89, 3095, 3102-06, 3200-05. In Siripongs' car, police found blood, bank books and receipts from the market, and Pat Wattanaporn's watch. RT 1787-88, 1792-93, 2995-97, 3107-11.

At trial, the defense presented no evidence in the guilt phase, choosing instead to challenge the sufficiency of the state's evidence.

During the penalty phase, the prosecution did not present any additional evidence. Siripongs called seven witnesses, including his employer, law enforcement personnel who described Siripongs' cooperation in the investigation of a crime of which Siripongs was a victim, and jail officials who described Siripongs as a good prisoner. RT 3538, 3543-5071, 3574-3605.

C. Habeas Proceedings In Federal Court

Siripongs alleged his trial counsel rendered constitutionally ineffective assistance in three areas.[2/] One, he failed to investigate the possible

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2. Additional allegations were resolved adversely to Siripongs and are not the subject of this petition

defense that Siripongs was a "mere" accomplice to the murders. Two, he failed to investigate and present background mitigating evidence of Siripongs' past in Thailand. Three, he failed to investigate the details surrounding Siripongs' burglary conviction in Thailand. ER 123-124. These claims had previously been made and denied in the state court without an evidentiary hearing. ER 158-159, 161; SER 18.

The State filed a motion for summary judgment (FED. R. CIV. P., rule 56), arguing that no genuine issue of fact existed regarding either prong of Strickland. Siripongs filed a motion for evidentiary hearing. See ER 518. He also filed a motion for discovery, which the district court granted in part, ordering the deposition of Siripongs' trial counsel, which was taken over a two-day

period. ER 521; SER 39-235.[3/] The court also authorized funds for investigation in Thailand and ordered Siripongs to present by way of affidavit or declaration the mitigating evidence he claimed should have been presented. ER 522, 1231-1235. The district court eventually authorized over $350,000 to Siripongs' habeas counsel to investigate and present his claims. SER 38.

The district court denied Siripongs' motion for an evidentiary hearing, finding that Siripongs'

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3. Siripongs was represented at trial by the Orange County Public Defender's Office. Trial attorney James Spellman was a certified criminal law specialist who had been with the office for ten years, trying 70 to 75 cases. SER 113, 144, 175. Two investigators and two writs and appeals attorneys also worked on the case. SER 177-79.

Although Spellman was an unsuccessful candidate for Congress in 1982, he testified that his personal endeavor did not interfere with his representation of Siripongs and he did not devote significant time to the campaign. See SER 114-15, 119.

allegations, even if true, would not warrant the granting of the writ. App., C187. The court granted summary judgment and denied the petition for writ of habeas corpus. Specifically, it found regarding the ineffective assistance claims that Siripongs could not satisfy the Strickland test.

The district court considered the 200-page deposition of Siripongs' trial counsel. It noted that Spellman was unable to recall any details of his representation of Siripongs over ten years before and that there was no reason to believe a hearing in open court would change his responses. App., C195, n.10. The court also considered the affidavits, declarations and other evidence submitted by Siripongs and concluded that credibility was not an issue. App., C194-C196.

Accomplice Theory. The district court found this claim failed for three reasons. First, there was no evidence that Siripongs had ever identified an accomplice for trial counsel or even acknowledged he had an accomplice. Therefore, counsel's failure to investigate an accomplice theory was not unreasonable under such circumstances. App., C190-C191.[4]

Second, the court found the accomplice defense theory to be "absurd," and that counsel's failure to pursue such a "facially nonsensical series of events" did not rise to the level of a Strickland violation. App., C191-C192. Even if there were an accomplice, all the evidence still pointed to Siripongs as the murderer. App., C191, n.8.

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4. To this day, Siripongs has never identified who the "real killer" supposedly is, nor has he even acknowledged by way of affidavit or declaration that he had an accomplice.

Third, even if the theory had validity, it would have required the admission that Siripongs was, at the very least, present during the double murders. "This would negate any chance of acquittal, an outcome that trial counsel apparently felt was in his reach when he opted to attack the sufficiency of the prosecution's evidence." App., C192. Thus, counsel's decision was a matter of reasonable tactics. App., C192.

Failure To Present Mitigating Evidence. The district court considered numerous declarations presented by Siripongs on mitigation, including those of a Thai cultural expert, a psychologist, and a "Strickland" expert, as well as declarations from friends and family members. The court accepted them as true. App., C195-C196. The court found, however, that neither prong of Strickland could be satisfied. First, defense

counsel made the tactical decision not to present the testimony of Siripongs' family and friends because he did not want the jury to learn that Siripongs had a prior conviction for a burglary committed in Thailand.[5/] The district court found, "Evidence that [Siripongs] previously participated in a burglary, even one without violence, would be extremely damning." App., C197. The court found this valid strategy had been affirmed by many courts, including this Court in Burger v. Kemp, 483 U.S. 776, 792-793 (1987). App., C198.

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5. The defense team transported Siripongs' mother from Thailand to Orange County in anticipation of her penalty phase testimony. RT 3623, 3640. Spellman intended for Siripongs' girlfriend, Peung, and her sister, Noon, to testify and present "personalizing details about Siripongs." SER 6. Both Peung and Noon had known Siripongs in Thailand, as had other available witnesses. RT 2135-36, 2353-54, 2610, 3623, 3640, 4634; SER 6.

Second, Siripongs had failed to demonstrate prejudice. The district court found that had the background witnesses testified, it would have been inevitable that the burglary evidence would have become known to the jury, which would have been "very damaging." App., C202. In contrast, the court found the potential mitigating evidence, including that of the Thai cultural expert, to be "utterly unmoving" as it showed Siripongs' upbringing to have been "neither particularly deprived, nor abusive." App., C203. In sum, the court found,

> "the humanizing evidence, coupled with the psychological and cultural testimony, would hardly begin to counterbalance petitioner's prior involvement in a burglary and the particularly aggravating circumstances of the crimes in

issue--the premeditation (e.g. arranging in advance to call in sick at work), the violence, and the post-murder arrogance of using the victims' credit cards to buy Christmas presents. The court is confident in its view that there is no reasonable probability that the penalty phase envisioned by petitioner would lead to a different sentence." App., C205.

Investigation Of Thailand Conviction. Siripongs' theory was that if counsel had investigated the Thailand burglary better, he would have learned it was non-violent. The district court found that further investigation would have been irrelevant because the trial court had ruled that the offense was non-violent. It was defense counsel who had successfully argued that point at trial.

App., C207-C208. The district court found that defense counsel's decision to avoid any possibility that the jury would learn of the burglary did not turn on the violent or non-violent nature of the offense, but on the fact that the offense had occurred and would be damaging if the jury learned of it. App., C208.

D. The Ninth Circuit Decision

The Ninth Circuit majority held that Siripongs was entitled to an evidentiary hearing in order to "develop the record." Specifically, the court explained:

> "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary

hearing in federal court. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir. 1990); see Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir. 1992). Siripongs has never received an evidentiary hearing in state or federal court, and has raised a colorable claim. We therefore hold that Siripongs is entitled to an evidentiary hearing in order to develop the record on his ineffective assistance of counsel claims." App., A5-A6.

Accomplice Defense. Regarding the "accomplice defense" theory, the majority rejected the district court's factual conclusion that the decision not to pursue that theory was a matter of tactics. The majority found instead that the accomplice defense was the "only

viable defense" and it was not investigated adequately. App., A25. The majority disagreed that Siripongs' failure to identify an accomplice, or even acknowledge that one existed, excused his counsel from pursuing that theory. It found that counsel should have considered the possible influence of Thai cultural values of shame and dishonor on Siripongs' refusal to identify an accomplice. App., A28-A29. Finally, the majority opined that even if there may have been a valid tactical reason not to present the accomplice defense at the guilt phase, it should have been presented at the penalty phase. App., A27.

The majority rejected the argument that Siripongs had failed to demonstrate the second prong of Strickland, prejudice. It explained,

> "if a hearing is necessary on the question of deficient

> performance, it is generally likely that a hearing also will be required for determination of whether the alleged deficient performance probably influenced the outcome of the trial. See Hendricks, 974 F.2d at 1110." App., A30.

The majority refused to find Siripongs had failed to demonstrate prejudice "without a better sense of the potential strength of this defense." App., A30.

The dissent strongly disagreed with the majority's holding. "As I see it, Siripongs wants to have the district court and us engage in the kind of hindsight that the Supreme Court has warned against [citing Strickland]." App., A70. The dissent described the evidence against Siripongs as "powerful." App., A71. It found the accomplice defense to be based on an improbable

scenario which was being promoted in a "marvelous display of second guessing by `experts.'" App., A72. "Certainly this hindsight defense does not so outstrip counsel's strategy as to permit a finding of ineffectiveness." App., A74.

Mitigating Evidence/Burglary Investigation. The majority disregarded the district court's conclusion that defense counsel had made a tactical decision not to present evidence of Siripongs' Thailand history so as to preclude admission of the Thailand burglary. App., A33-A34. It also disregarded the district court's finding that further investigation regarding the burglary would have been irrelevant because counsel did not want it to come before the jury under any circumstances. App., A34. Finally, it made no mention of the district court's finding that the mitigating evidence presented in

opposition to the summary judgment motion was "utterly unmoving," instead holding the evidence "would undoubtedly have improved Siripongs' chances of receiving a life sentence rather than the death penalty." App., A34.

The dissent found that the theory that defense counsel did not understand the nature of the burglary conviction was a "misstatement of the record." App., A74-A75. It agreed with the district court that counsel had made a tactical decision not to put on the "humanizing" witnesses and that, in any event, the "humanizing" evidence was not significant. App., A75.

> "It seems to me that counsel could properly and competently decide that it was well worth excluding that evidence in order to assure the exclusion of references to the prior crime.

No evidentiary hearing is needed to demonstrate that." App., A75.

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REASONS FOR GRANTING THE WRIT

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OVERVIEW: THE NINTH CIRCUIT HAS ERRONEOUSLY EXPANDED THE PROPER FUNCTION OF AN EVIDENTIARY HEARING, VIRTUALLY MANDATING SUCH A HEARING FOR EVERY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

In capital cases in particular, the Ninth Circuit has strayed further and further from the principles expressed by this Court in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977) and Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This case is an egregious example of how far the Ninth Circuit has gone and demonstrates the need for this Court step in to reverse this trend.

The majority held that Siripongs is entitled to delay his execution and tie up federal court resources by granting him an evidentiary hearing to "develop the record" on claims that the district court

found "absurd" or "utterly unmoving" and that the dissent found were based on the hindsight this Court warned against in Strickland, 466 U.S. at 689-90. There are approximately 624 condemned inmates in state prisons in seven states having a death penalty within the jurisdiction of the Ninth Circuit. Claims of ineffective assistance of counsel are raised in virtually all death penalty cases. If the majority's reasoning in this case is applied to all ineffective assistance of counsel claims, then evidentiary hearings will be required in every case.

Habeas petitioners do not have a "right" to an evidentiary hearing simply because they make allegations which on their face may have merit. As this Court made clear in Blackledge, 431 U.S. 63, 80-81, the district courts may employ various procedural vehicles short of a full-

fledged evidentiary hearing to determine whether allegations have merit.

In this case, the district court authorized hundreds of thousands of dollars in investigative costs and attorney fees, ordered the deposition of Siripongs' trial counsel and encouraged the filing of whatever declaratory evidence Siripongs wished to present to support his allegations. The court concluded that no credibility issues existed and it accepted Siripongs' proffered evidence as true. Refusing to engage in hindsight and granting defense counsel the deference required, the court found that Siripongs could not meet his burden of proving his counsel's deficiency because counsel's actions were based on reasonable strategy. Nor could he meet his burden of proving prejudice because the evidence presented on that issue was not sufficient.

The Ninth Circuit gave no apparent deference to any of the district court's factual findings or to defense counsel's actions. It held instead that the claims were "colorable" and that Siripongs was entitled to an evidentiary hearing to "develop the record," even though no credibility issues were involved. The majority apparently agreed that Siripongs had not demonstrated prejudice regarding the guilt phase, and gave no weight to the district court's finding that the evidence regarding penalty phase prejudice was "unmoving." App., A30, A32-A34.

If this case requires an evidentiary hearing, all cases will. The warning of this Court that the "too promiscuous grant of evidentiary hearings on habeas" may "swamp" the district courts and cause "unnecessary friction" with the states, (Townsend v. Sain, 372 U.S. 293,

319, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)) will come true. The district courts will be tied up for years holding the "second trials" of the unsuccessful defense of death row petitioners. See Strickland, 466 U.S. at 690. To avoid this problem, this Court needs to reaffirm the lessons of Blackledge, decided in 1977, make clear that they apply to Strickland, decided in 1984, and put a halt to this egregious second-guessing of defense counsel by the Ninth Circuit.

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II

THE THREE QUESTIONS PRESENTED ARISE FROM THE NINTH CIRCUIT'S DISREGARD OF THE PRINCIPLES OF BLACKLEDGE AND STRICKLAND

A. "Colorable" Claims May Be Resolved Without An Evidentiary Hearing To "Develop The Record"

In Blackledge v. Allison, 431 U.S. 63, this Court cautioned against the view that every habeas Petitioner who alleges a colorable claim is entitled to an evidentiary hearing.

> "This is not to say that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing. As in civil cases generally, there exists a procedure whose purpose is to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of the evidence. That procedure is, of course, the motion for summary

judgment." Id. at 80; see FED. R. CIV. P., rule 56.

This Court explained that a judge may direct discovery or expand the record so as to enable him or her to "dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing." Id. at 81-82. That is exactly what the district court did here.

The Ninth Circuit views the law differently. In pronouncing Siripongs' "right" to an evidentiary hearing, the majority relied on its decision in Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990). App., A22-A23. In that capital case, the Montana Supreme Court had treated ineffective assistance of counsel claims as colorable and ordered trial counsel's responsive declaration. It relied on the declaration to find the

allegations to be without merit. Thereafter, the federal district court summarily denied the claim. Id. at 1170. The Ninth Circuit reversed and remanded for an evidentiary hearing because it found a colorable claim of ineffective assistance had been raised, and no hearing had been held. The Ninth Circuit held, "An ex parte submission of an affidavit by the trial counsel is procedurally inadequate; Smith is entitled to a full evidentiary hearing." Id., at 1170.

Smith was criticized in May v. Collins, 955 F.2d 299 (5th Cir. 1992), cert. denied, ___ U.S. ___, 112 S. Ct. 1925, 118 L. Ed. 2d 533 (1992). The Fifth Circuit observed that the Smith holding appeared to be based on faulty reasoning in light of Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). The Ninth Circuit had relied on two cases that predated Sumner to hold that a paper

hearing was an inadequate procedure for testing ineffective assistance of counsel claims. May at 313, n.14.

The pronouncement in Smith not only ignores Sumner but also ignores the directive of Blackledge that claims colorable on their face may be resolved short of an evidentiary hearing in exactly the manner employed by the Montana Supreme Court in Smith and the district court in this case. Here, rather than requiring an expensive and time consuming hearing, the district court ordered a deposition at which both Siripongs' counsel and the state could participate. SER 521-522. This procedure allowed the district court to determine that counsel's decisions were based on reasonable strategy. There is no additional record to "develop" in this regard.

The district court also ordered Siripongs to present all evidence that he

claimed should have been presented at the penalty phase in mitigation. SER 522. Because this evidence was accepted as true by the district court before it found that prejudice had not been shown, nothing further will be gained by an evidentiary hearing to "develop the record" on that issue.

It should not be subject to question that a habeas petitioner is not entitled to an evidentiary hearing where the factual allegations of deprivation of a constitutional right are rebuffed by the record. See Dennis v. California, 414 F.2d 424, 448 (9th Cir. 1969) cert. denied, 397 U.S. 1043, 90 S. Ct. 1367, 25 L. Ed. 2d 655 (1970). Because the district court properly found that Siripongs' claims of ineffective assistance of counsel, when viewed against the record, did not state a colorable

claim, an evidentiary hearing was unnecessary. App., C187.

While the district court's denial of Siripongs' petition for a writ of habeas corpus was subject to de novo review, the district court's factual findings in support of the denial should have been upheld unless clearly erroneous. Bianchi v. Blodgett, 925 F.2d 305, 308 (9th Cir. 1991). The clearly erroneous standard is applied even though the findings may have been based only on written affidavits. Anderson v. Bessemer City, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985); United States v. Alexander, 761 F.2d 1294, 1302 (9th Cir. 1985). The factfinder's view of the evidence cannot be clearly erroneous when two permissible choices exist. Anderson at 574.

The district court made many factual findings. It found the accomplice

theory to be "absurd." App., C191. It found defense counsel made the tactical decision[6/] to put the prosecution to its proof rather than present a defense that would have placed Siripongs at the scene. App., C192. It found that defense counsel had intended to call witnesses from Thailand, including Siripongs' mother, but made the tactical decision not to present that evidence so as to preclude admission of the Thailand burglary. App., C196. It found that the burglary conviction would have been admitted if the Thai witnesses had testified and would have been "very

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6. While the finding that counsel's tactical decision was sound (App., A192) was one of law subject to de novo review (See Tinsley v. Borg, 895 F.2d 520, 531 (9th Cir. 1990), cert. denied, 498 U.S. 1091, 115 S. Ct. 974, 112 L. Ed. 2d 1059), the finding that a decision was one of tactics is a factual finding entitled to the presumption of correctness. Rogers v. Zant, 13 F.3d 384, 387, n.5 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 255; Ellefson v. Hopkins, 5 F.3d 1149, 1151 (8th Cir. 1993).

damaging." App., C202. It found that the mitigating evidence which Siripongs claims should have been presented was "utterly unmoving." App., C203. It found that defense counsel had persuaded the trial court that the burglary was a non-violent burglary. App., C208, n.16.

Instead of giving deference to the district court's factual findings, the majority ignored them or rejected them without good cause. It also continued its trend, previously demonstrated in Smith, of widening the door to evidentiary hearings on claims of ineffective assistance of counsel, even when rebuffed by the record. It acknowledged Siripongs had not demonstrated prejudice regarding the accomplice defense, but held he has a "right" to "develop the record" on that point as well as the other issues raised. Review should be granted to reverse this

trend and to reaffirm the principles of Blackledge.

B. A Petitioner Has No "Right" To An Evidentiary Hearing On A Strickland Claim When He Fails To Allege How He Has Been Prejudiced

One of the most troubling aspects of the majority opinion is the notion that Siripongs must be granted an evidentiary hearing to "develop the record," although he has not alleged how he was prejudiced by failure to investigate the accomplice defense. See app., A6, A30, C191. Even if Spellman should have investigated further, the test of Strickland is not satisfied unless this failure caused an unreliable result or fundamental unfairness. Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 122 L. Ed. 2d 180, 187 (1993). It is Siripongs' burden to affirmatively prove prejudice. Strickland v. Washington, 466 U.S. at 693.

The majority refused to analyze accomplice-defense prejudice without first holding an evidentiary hearing to obtain a "better sense of the potential strength of the defense." App., A30. But the purpose of an evidentiary hearing is to resolve factual disputes, not to develop a defense. Townsend v. Sain, 372 U.S. at 312; 28 U.S.C. section 2254(d). Here there is no factual dispute in need of resolution because the record demonstrates the claims have no strength.

If the accomplice theory is a valid one, Siripongs must know the identity of the mystery killer. He also must know what counsel's further investigation would have revealed. Yet he refuses to tell anyone. Because he has refused or is unable to identify what favorable evidence would have been uncovered with more investigation, relief is not justified. See Martin v. Maggio,

711 F.2d 1273, 1281 (5th Cir. 1983) cert. denied, 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 373 (1984).

It defies logic to require the district court to consume court time and taxpayer resources, beyond the hundreds of thousands of dollars already spent, to explore an issue that Siripongs could have resolved years ago with a simple declaration identifying his cohort in crime. If Siripongs is entitled to an evidentiary hearing on essentially no showing, every other habeas petitioner in the Ninth Circuit will also be so entitled. No district court will dare refuse a motion for evidentiary hearing because to do so will result in inevitable reversal under this weak standard. Review is necessary to make clear that the principles of Blackledge apply to the prejudice prong of Strickland.

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C. The Ninth Circuit Is Failing To Follow This Court's Caution To Avoid Hindsight When Evaluating Defense Counsel's Performance

The Strickland test is supposed to be a "rigorous standard" which is "highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). The numerous displays of hindsight and second guessing that appear in the majority's opinion (and are highlighted by the dissent), are clearly contrary to Strickland, but are consistent with another recent Ninth Circuit death penalty decision by a different panel. The decision here is as egregious as the decision in Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994), cert. pet. pending, Calderon v. Wade, No. 94-761 (filed Oct. 26, 1994). There, the majority second guessed counsel's tactical decisions in putting on certain evidence during the penalty phase and in framing his argument.

The dissent explored the faulty reasoning at length and criticized the impermissible hindsight analysis. Id. at 1338-1349, (Trott, J., dissenting); see also Tomlin v. Myers, 30 F.3d 1235, 1243-1251 (9th Cir. 1994) (George, D.J., dissenting).

When this Court elaborated on the requirement of effective assistance of counsel 10 years ago in Strickland, it observed that the purpose of the constitutional requirement was to ensure a fair trial. Strickland, 466 U.S. at 686. The purpose is "not to improve the quality of legal representation." Id. at 689. Moreover, reasonable minds will differ on what is the best legal representation because "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id. at 689.

The majority forgot that reminder when it relied on the declaration of one so-called "Strickland expert" who

had not interviewed defense counsel and did not know the basis for his tactical decisions. ER 939. The majority's focus was on what it and a second-guessing "expert" believed may have been the best strategy, not on whether Spellman's strategy was reasonable under the circumstances at the time.

The majority also forgot or rejected this Court's instructions that counsel's actions are quite properly based on information supplied by the defendant. Id. at 691. Where, as here, Siripongs failed to supply his counsel with any information that would justify investigation of an accomplice defense, his failure to do so cannot be unreasonable. Instead, Siripongs' refusal to reveal to trial counsel the identity of any alleged other killer destroys his habeas claim. See Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982) cert. denied,

461 U.S. 910, 103 S. Ct. 1886, 76 L. Ed. 2d 815 (1983); People v. Haskett, 30 Cal. 3d 841, 853, 180 Cal. Rptr. 640, 640 P.2d 776 (1982).

The majority also engaged in improper second guessing regarding the presentation of penalty phase evidence. The district court found that Spellman had investigated his client's background and intended to call Siripongs' mother, his girlfriend, and members of her family. ER 1069. Because sufficient witnesses were available who had known Siripongs in Thailand and could "humanize" him, further investigation to uncover cumulative evidence was not necessary. See Burger v. Kemp, 483 U.S. 776, 794-95, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987). The majority instead indicated more investigation should have been done. App., A32-A34.

But even if more investigation had been done, it would not have mattered because, as the district court found, "Spellman did not want the burglary conviction to be presented to the jury under any circumstances." App., C198. This type of strategic decision was approved in Burger v. Kemp, 483 U.S. at 792-93; see also Strickland v. Washington, 466 U.S. at 699-700; Gray v. Lucas, 677 F.2d at 1093. By barring the prosecutor from presenting any evidence of Siripongs' criminal activity in Thailand, Spellman was in the strong position of presenting to the jury a man with no apparent criminal background. This rare advantage in a capital case should not be taken lightly. However, the majority gives it no credit whatsoever. App., A33-A34.

Because Spellman made this strategic call, this case differs from Mak v. Blodgett, 970 F.2d 614, 618-19 (9th

Cir. 1992) cert. denied, ___ U.S. ___, 113 S. Ct. 1363, 122 L. Ed. 2d 742 (1993), relied on by the majority. There, defense counsel failed to engage in any tactical evaluation in opting not to present humanizing evidence. See App., C200, n.12. In contrast, Spellman wanted to humanize Siripongs, but expressly balanced that desire against the more compelling opportunity to present a client with an apparently clean history.

By rejecting defense counsel's strategy as reasonable, the majority again demonstrated it has gone beyond the restraints of Strickland. Review must be granted to correct an erroneous expansion of the law and to ensure that the principles of Strickland remain rigorous.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General
GEORGE WILLIAMSON, Chief
Assistant Attorney General
GARY W. SCHONS, Senior
Assistant Attorney General
WILLIAM M. WOOD, Supervising
Deputy Attorney General
M. HOWARD WAYNE, Supervising
Deputy Attorney General

Laura Whitcomb Halgren
LAURA WHITCOMB HALGREN*
Deputy Attorney General

*Counsel of Record

110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2298

Attorneys for Petitioner

AFFIDAVIT OF SERVICE

Attorney:

DANIEL E. LUNGREN
Attorney General of
the State of California
LAURA WHITCOMB HALGREN
Deputy Attorney General

110 West A Street, Suite 1100
P.O. Box 85622
San Diego, California 92186-5266

Attorneys for Petitioner,

Case No:_____
October Term, 1994

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General,

Petitioners,

v.

JATURUN SIRIPONGS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100; P.O. Box 85266, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICES TO PETITION FOR WRIT OF CERTIORARI as follows:

To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

W. Toliver Besson
Paul, Hastings, Janofsky & Walker
1299 Ocean Avenue, Fifth Floor
Santa Monica, California 90401
(310) 319-3300
Attorneys for Jaturun Siripongs

Gregory P. Lindstrom
Linda Schilling
Latham & Watkins
650 Town Center Drive, 20th Floor
Costa Mesa, California 92626
(714) 668-6282
Attorneys for Jaturun Siripongs

California Appellate Project
Gail R. Weinheimer, Legal Director
Janice L. Bergmann, Staff Attorney
One Ecker Place, Suite 400
San Francisco, California 94105
(415) 495-0500
Attorneys for Amicus Curiae

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 9th day of November, 1994.

There is a delivery service by United States mail at each place so addressed or regular communication by United States between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 9, 1994.

OFFICIAL SEAL
MICHELLE R. RENAUD
NOTARY PUBLIC-CALIFORNIA
COMMISSION # 977280
SAN DIEGO COUNTY
My Commission Exp. November 8, 1996

Lidia Hernández
LIDIA HERNANDEZ

Subscribed and sworn to before me this 9th day of November, 1994.

Michelle R. Renaud
Notary Public in and for said County and State